IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 10.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.137 of 1992

and

Tr.A.S.No.765 of 1995

In A.S.No.137/1992
Kandasami Gounder .. Appellant/Plaintiff

vs.

1.Chetiyannan @ Chettiya Gounder
2. Pavayee .. Respondents/Defendants.

In Tr.A.S.No.765/1995
1. Kandasami Gounder
2. Pavayee
3. Srinivasan .. Appellants/Defendants.

Vs.

Settiannan @ Settia Gounder .. Respondent/Plaintiff.

Prayer: The Appeals have been filed against the common Judgment passed in O.S.No.240 & 403 of 1988 on the file of the Subordinate Court, Namakkal dated 27.3.1991.

As per A.S.No.137/1992
For Appellant : Mr. S.Sethurathinam, senior counsel for Mr.K.Kuppusamy in both appeals.

For Respondents : Mr. Srinath Sridevan (for 1st respondent) in AS.137/92 and Respondent in Tr.AS.765/95.

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COMMON JUDGMENT

These appeals have been preferred against the common Judgment passed in O.S.No.240 & 403 of 1988 on the file of the Subordinate Court, Namakkal. The plaintiff-Kandasamy Gounder in O.S.No.240/1988 is the appellant in A.S.No.137/1992. The first Defendant-Kandasamy Gounder in O.S.No.403/1988 is the appellant in A.S.No.765/1995.

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2. The averments in the plaint in O.S.No.240/1988 are as follows:

2(a) The suit has been filed by the plaintiff for partition of his one half share in the plaint schedule property and for permanent injunction. The first Defendant is the eldest brother of the plaintiff. The second Defendant is the wife of the plaintiff. The first Defendant and his father along with the plaintiff constituted a Hindu Joint Family. The plaintiff, the first Defendant and their father had executed sale deeds dated 9.9.1964, 12.03.1965, 2.5.1966 in respect of the family properties to purchase other properties. The plaintiff's father expired in the year 1966. The first Defendant was lookingafter the joint family affairs as the kartha of the family. The plaintiff got married some 25 years back. The first Defendant got married only 10 years back. Till the marriage the plaintiff was residing in the joint family. Out of the sale proceeds of the joint family properties, plaint schedule Item No.1 and 2 were purchased.

2(b) At the time of the purchase of the first item of the plaint schedule property viz. Cheman-kuli-kadu, there was no well or shed in it. Electricity motor service connection was obtained only in the name of the plaintiff. From the joint family income motor pump set was also installed in the said property. Item No.1 of the plaint schedule property was purchased from the father-in-law of the plaintiff. By improving Item No.1 of the plaint schedule property out of all the joint efforts and income item No.3 of the plaint schedule property was also purchased in the name of the first Defendant. The name of Item No.3 property is Karung-kadu. After the marriage of the first Defendant, he was residing in Item No.2 property and plaintiff is residing in item No.1 property. Both the plaintiff and the first Defendant were enjoying the family properties jointly.

2(c) Some eight years back the first Defendant informed that the joint family properties can be partitioned by meates and bounds and till then plaintiff is living in Item No.1 (Cheman-Kuli-kadu) property and cultivate three acres of land by paying the kist and electricity consumption charges for the motor pump set and that the plaintiff also agreed to reside in the remaining portion of Item No.1 and also in Item No.2 (Karung kadu) properties and to reside in the house, which is situated at Village Natham. In the plaint schedule property Item No.1 to 3 properties plaintiff and the first Defendant are each entitled to one half share.

2(d) On 09.05.1988 plaintiff issued notice. But without giving any reply the first Defendant had filed O.S.No.262/1988 on the file of the District Munsif Court, Rasipuram and also obtained ad-interim injunction. The first Defendant is entitled to one half share in the plaint schedule property and the second Defendant is entitled to a right in Item No.3 schedule property including the well and pump set. Hence the plaintiff has filed the suit for partition.

3. In the written statement filed by the first Defendant, he would contend that the first Defendant was not managing the joint family

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property as kartha of the family. The plaintiff's father died in the year 1969 and not in 1966 as alleged by the plaintiff. After sale of the family properties in 1964 and 1966, the family debts were discharged and the plaint schedule properties were divided between the plaintiff, first Defendant and their father. The first Defendant's mother was a house wife. Item No.1 and 2 properties were not purchased out of the joint family income, in the name of the first Defendant. The allegation that after the marriage of the first Defendant, the plaintiff was residing in Item No.1 property and the first Defendant was residing in the Village Natham property and the second item of the plaint schedule porperty are not true. The family properties were not enjoyed in common. With regard to the plaint item No.1 and 2 properties there was no agreement entered into between the plaintiff and the first Defendant in respect of mode of enjoyment. The first Defendant had purchased the plaint item No.1 and 2 properties from the plaintiff's father-in-law for consideration of Rs.10,000/- and the first Defendant had purchased item No.3 property for Rs.8,400/- on 27.9.1972 from the legal heirs of Venkatasubramaniya Iyar. The sale consideration for the above said two sale deeds in respect of item No.1 to 3 of the plaint schedule properties were derived out of his own income. From the date of purchase of the plaint schedule item No.1 and 2 properties, the first Defendant is in possession and enjoyment of the properties. The first Defendant had obtained loan in Agricultural Thrift Bank at Vennanthurai and dug a well. He has also put up a shed and titled house in Item No.1 property. During his visit to the first defendant's house to see his mother, the plaintiff under the pre-text of obtaining electricity connection for the first item of property, has obtained electricity connection in his name for the motor pump set in the first item of property. The electricity connection was also subsequently disconnected. Now the first Defendant is paying the electricity consumption charges on behalf of the plaintiff. The first Defendant requested the plaintiff to execute a sale deed in respect of S.No.108/2 along with well since it is situated adjacent to the second item of property, which is in the possession of the first Defendant, the plaintiff had rejected the said proposal. Since the plaintiff had interfered with the peaceful possession and enjoyment of the plaint schedule properties, the first Defendant had filed the suit before the District Munsif Court, Rasipuram, against the plaintiff. The plaintiff along with the second Defendant is attempting to trespass into the plaint schedule property and has removed the motor pump set from the well in item No.1 property. The plaintiff has also filed a vexatious suit in O.S.No.38/1989. Hence, the suit is liable to be dismissed. The second Defendant remain exparte.

4. The first Defendant in O.S.No.240/1988 has filed O.S.No.403/1988 against the plaintiff in O.S.No.240/1988. The plaint averments in O.S.No.403/1988 in brief are as follows:

4(a) The plaint schedule properties are self acquired properties of the plaintiff. The plaintiff had purchased item No.1 property on 14.6.1967 for a sum of Rs.10,000/- from the father-in-law of the first Defendant and the second item of the property was purchased by the

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plaintiff on 27.9.1972 for Rs.8,400/- from Venkatasubramaiya Iyar. Patta, chittu and adangal for the suit property stands in the name of the plaintiff. The land tax is being paid by the plaintiff. No one else is having any right in respect of the suit property. The first Defendant is the younger brother of the plaintiff. The second Defendant is the wife of the first Defendant. The third Defendant is the son of the first and second Defendant. The plaintiff, first Defendant and their father Chettiya Gounder executed sale deed in the year 1966 in respect of the family properties and they have divided the sale proceeds and the first Defendant after getting his share in the sale proceeds went to his father-in-law's house at Olaipatty and resided there. The plaint schedule item No.2 and land belonging to the second Defendant are adjacent lands. Item No.2 property and well in S.No.198/2 are common properties. The plaintiff has refused to sell item No.2 property. The plaintiff has improved item No.2 property and has put up a poultry and in item No.2 property there is a common well being enjoyed by the plaintiff and the first Defendant in equal moites. For the past three months the Defendants are obstructing the plaintiff from drawing water from the common well situated in plaint item No.2 property. On 10.6.1988 with the plaintiff went to collect cotton from the suit property, the Defendants have obstructed the plaintiff from doing so. If cotton plants were not irrigated then the entire product will get spoiled. The Defendants irrigated their crops through the common well. In S.No.198/2, only in the well the plaintiff and the second Defendant are in common enjoyment. Other properties belonged to the plaintiff exclusively. Hence, the plaintiff has filed the suit for injunction.

4(b) The Defendants have filed a written statement contending that the description of the plaint schedule properties are not correct. The plaint item No.1 and 2 were not the separate property of the plaintiff. Out of the sale proceeds of the family properties in the year 1966 item No.1 and 2 properties were purchased by the plaintiff. The first Defendant never obtained his share in the said sale proceeds and left for father-in-law's house. The second Defendant is enjoying the property as legal heirs of his father. The first Defendant and the second Defendant are each entitled to one half share in the plaint schedule item No.2 property. The Defendants and the plaintiffs are each entitled to one half share in the suit properties. The Defendants have not obstructed the plaintiff from taking water in the common well. The suit properties are being enjoyed by the plaintiff and the first Defendant in common and according to their convenience. The first Defendant had filed a suit for partition and also issued a notice on 9.5.1988. The plaintiff has filed O.S.No.262/1982 on the file of the District Munsif Court, Rasipuram and obtained a temporary injunction. The first Defendant had preferred O.S.No.175/1991 on the file of the Subordinate Court, Namakkal. There is no cause of action and the suit is liable to be dismissed.

5. On the above pleadings the trail Court had framed as many as ten issues in O.S.No.240/1988 and five issues in O.S.No.403/1988 and on the basis of the documentary and oral evidence, has dismissed O.S.No.240/1988

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and decreed O.s.No.403/1998. Aggrieved by the findings of the trial Court, the plaintiff in O.S.No.240/1988 has preferred A.S.No.137/1992 and the first Defendant in O.S.No.403/1988(plaintiff in O.S.No.240/88) has preferred A.S.No.765/1995.

6. Now the point for determination in these appeals is whether Ex.B.1 and B.2, sale deeds, dated 14.12.1967 and 27.09.1972 are taken in the name of the first Defendant in O.S.No.240/1988 viz. Chettiya Gounder from out of his own income or from out of the income derived from the joint family properties?

7.The point:-

7(a) Admittedly the plaintiff in O.S.No.240/1988 viz. Kandasamy Gounder, the first Defendant(Chettiya Gounder) are brothers. They had family properties and along with their father, the plaintiff and the first Defendant have executed Ex.A.1 to 3, sale deeds, in the year 1964 and 1966 respectively. It is the case of the plaintiff in O.S.No.240/1988 that only out of the joint family income, the first Defendant (Chettiya Gounder) had purchased Ex.B.1 and 2 properties, as Kartha, being the eldest son of the joint Hindu family. The only defence of the first Defendant before the trial Court is that Ex.B.1 and B.2, sale deeds in respect of the plaint item No.1 to 3 properties were taken by the first Defendant out of his personal income derived from the business he had conducted.

7(b) The learned trial Judge has forgotten for a moment that the first Defendant, the plaintiff along with their father constituted a Hindu joint family and the plaint schedule item No.1 to 3 properties were purchased in the name of the first Defendant under Ex.B.1 and B.2, sale deeds, as kartha of the family. The first Defendant would contend that Ex.B.1 and B.2 were purchased out of the income derived from his business. Now the burden his heavily on the first Defendant to prove that only from his separate income Ex.B.1 and B.2, sale deeds, were taken by him.

7(c) At paragraph 19 of the Judgment, the learned trial judge relying on the evidence of P.W.2 has come to a conclusion that plaint item No.1 and 2 were purchased out of the income of the first defendant. P.W.2 has deposed to the fact that the first Defendant had indulged in ground nut business, sugar trade and cereals business. But to show that the first Defendant had indulged in ground nut business, sugar trade and cereal business, the first Defendant has not produced any documentary evidence in support of his claim. Unless the first Defendant proves that the plaint schedule item No.1 and 2 properties are purchased from out of his separate income, it cannot be said that Ex.B.1 and B.2, sale deeds, were taken from out of his own income.

7(d) In Hindu Law by N.R.Raghavachari, 9th edition, at page 229, it has been enumerated as follows:

> "Presumptions in respect of joint family and self acquired property:
>
> There is a presumption of jointness in a Hindu family and that jointness subsists till a partition is

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proved (Marjadi Devi Vs. Jagannath Singh, A.I.R. 1983 Pat. 129), See (Sambandam Vs. Chokalingam, (1994) 2 MLJ 582). Where a certain property is claimed by a corparcener as his own self-acquired property and the other coparceners of his family claim it as the joint family property, the question arises as to the burden of proof in respect of these rival allegations (See Murugesa Naicker Vs. Sadaiyappa naicker, (1996) 2 MLJ 229). The joint family is the normal condition of Hindu society and every such family is ordinarily joint not only in estate, but in food and worship. Hence a Hindu family must be presumed to remain joint and the burden of proving sepration is upon the person alleging it (Raghunada Vs. Brozo, ILR 1 Mad 69 : LR 3 IA 154; Beer Narain Singh Vs. Teen Couree Nundee, 1 W.R 316; Neelkisto Vs. Beerchunder, 12 MIA 523; Mt.Cheetha V. Baboo Mihen Lal, 11 MIA 369; Naragunty Vs. Vengama, 9 MIA 66; Nageshar Baksh Singh Vs. Ganesha, ILR 42 All. 368 : LR 47 IA 57 : 13 LW 622 : 18 ALJ 532 : 22 Bom. Legal representative 596 : 38 MLJ 521: AIR 1920 PC 46. See also Ponnuswamy Vs. Meenakshi Ammal, (1988) 2 MLJ 507. But this presumption is weakened as one goes further from the founder of the family; M.THANIKACHALAM. Inderr Kuer Vs. Mt.Pithipal Kuer, 58 LW 421; State of Travancore Vs. A.K.Panikar, AIR 1971 SC 996; Indiranarayan Vs. Roop Narain, (1971) 1 SC Wr 764 {Presumption is strong in the case of father and son); Muchhu Rana Vs. Netrananda, (1974) 40 Cut. L.T.1319: Sant Ram Vs. Paramanand, (1977) 79 PLR 605; Kaushal Kishore Vs. Dharam Kishore, (1977) 79 PLR 749]. The presumption of union is the greatest in the case of father and sons [Malakchand Vs. Hirlal, (1936) ILR 11 Luck 449: 157 IC 945]. Brothers are for the most part presumed to be undivided, second cousins generally separated [Moro Viswanath Vs. Ganesh, (1873) 10 Bom. H.C.444; 463. See also Bharat Singh Vs. Bhagirathi, (1966) 2 SCJ 53. "The presumption of union is stronger in the case of brothers than in the case of cousins and the further you go from the founder of the famly, the presumption becomes weaker and weaker" [Yellappa Vs. Tippanna, (1929) 56 IA 13 : ILR 53 Bom. 213 (PC) : 29 LW 231 : 33 CWN 238 : 56 MLJ 287 : 1929 ALJ 4 : 31 Bom LR 249 : AIR 1929 PC 8]. The presumption of jointness however continues until the contrary is shown [Chandreshwar Singh Vs. Ramachandra Singh, AIR 1973 Pat 215]. It is not open to one member of the joint family to separate himself from only one other member and remain joint with the others. He cannot be joint with some and separate from others [Inder Narayana Vs. Roop

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> Narayan, (1971) 1 SCWR 764] Revenue entries as to the status of the family are evidence of its being joint or divided [Smt.Murtu Vs. Smt. Giari, 1973 SLJ 209]. Where it is shown that the property in question has been possessed by one of the lines of a family for several generations, there is a presumption that line has become separated from the other lines which subsequently lay claim to the proeprty [Yellappa Vs Tippanna, supra ; Cf., Shiam Sunder Gautam Vs. Tara Chand, 1978 HP 24]. But there is no presumption that because a family is joint, it possesses my joint property."

7(e) There is absolutely no evidence on record to show that there was a partition between the plaintiff and the first Defendant in respect of the joint family property and that they are living separately having separate food and separate residence. Further it is pertinent to note from Ex.B.11, a document produced by the first Defendant, Chettiya Gounder, that even in form No.34/A produced before the income tax authorities under column 2 the status of the first Defendant has been shown as Hindu undivided family (HUF). So it is clear that even on 6.1.1983 i.e, on the date of Ex.B.11, the plaintiff and the first Defendant constituted a Hindu joint family. Since the first Defendant has failed to establish that Ex.B.1 and B.2, sale deeds, were taken from out of his self earned income from the business alleged to have been run by him, it cannot be said that Ex.B.1 and B.2 properties are the self acquired properties of the first Defendant-Chettiya Gounder. Under such circumstances, the unrebutted presumption will be that Ex.B.1 and B.2 properties i.e. Item No.1 to 3 of the plaint schedule properties were purchased by the first Defendant-Chettiya Gounder from out of the joint family income in the name of the first Defendant being the kartha of the Hindu Joint Family. Under such circumstances, this Court has necessarily to interfere with the findings of the learned Sub-Judge, Namakkal, in O.S.No.240/1988 and 403/1988. The point is answered accordingly.

8. In the result, the A.S.No.137/1992 is allowed and the decree and Judgment passed in O.S.No.240/1988 on the file of the Sub-Court, Namakkal, is set aside and a preliminary decree for partition of the plaintiff's one half share is passed as prayed for. A.S.No.765/1995 is also allowed and consequently, the decree and Judgment passed in O.S.No.403/1988 on the file of the Sub-Court, Namakkal, is set aside and O.S.No.403/88 is dismissed. In the circumstances, the parties shall bear their own costs

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in both the appeals. Mode of partition in O.S.No.240/1988 is relegated to the final decree proceedings.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,
1. The Subordinate Judge,
Namakkal.

2. The Record Keeper, VR Section, High Court, Madras.

+ 2 CCs to Mr.Srinath Sridevan, Advocate SR NO 47303 and 47305

A.S.No.137 of 1992
and
Tr.A.S.No.765 of 1995

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